RECORD AND BRIEFS

FILED
JUN 16 2017

IN THE
Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,

v.

JACOB LEWIS,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth, Seventh, and Ninth Circuits

BRIEF OF THE RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS IN NOS. 16-285 AND 16-300 AND RESPONDENT IN NO. 16-307

DEBORAH R. WHITE
RETAIL LITIGATION CENTER, INC.
1700 N. Moore Street
Suite 2250
Arlington, VA 22209

ADAM G. UNIKOWSKY
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

(Additional captions on inside cover)

ERNST & YOUNG LLP, AND ERNST & YOUNG U.S. LLP,
Petitioners,

v.

STEPHEN MORRIS AND KELLY MCDANIEL,
Respondents.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MURPHY OIL USA, INC., ET AL.,
Respondents.

QUESTION PRESENTED

Whether the collective-bargaining provisions of the National Labor Relations Act prohibit the enforcement under the Federal Arbitration Act of an agreement requiring an individual to arbitrate claims against an employer on an individual, rather than collective, basis.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. The Board's Interpretation of Section 7 of the NLRA is Incorrect. 6

A. The Unilateral Filing of a Class Action Does Not Constitute "Concerted Activities." 7

B. The Board's Interpretation of Section 7 Undermines the NLRA's Purposes 14

i. The Board's Decision Undermines the NLRA's Purposes, as Explained in the NLRA's Preamble. 14

ii. The Board's Interpretation of Section 7 Undermines the NLRA's Purpose as Elaborated by This Court. 16

C. Section 7 Cannot Reasonably Be Interpreted to Confer a Right to Invoke a Procedural Rule that Did Not Exist at the Time of Section 7's Enactment. 19

D. The Board's Decision Violates the Rules Enabling Act. 20

E. The Board's Decision Impermissibly Expands the Board's Power. 22

II. The Board's Decision Conflicts with Other Aspects of Federal Labor Law 26

A. The Board's Decision is Inconsistent with Employees' Statutory Right to Resolve Disputes Individually 26

B. The Board's Decision is Inconsistent with the Norris-La Guardia Act. 28

III. *Chevron* Deference is Unwarranted 30

CONCLUSION 32

TABLE OF AUTHORITIES

CASES

Altex Ready Mixed Concrete, 223 N.L.R.B. 696 (1976) 8

Altex Ready Mixed Concrete Corp. v. NLRB, 542 F.2d 295 (5th Cir. 1976) 8

AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) 2, 27-28

BE&K Construction Co. v. NLRB, 536 U.S. 516 (2002) 24, 25

Borough of Duryea v. Guarnieri, 564 U.S. 379 (2011) 24

Califano v. Yamasaki, 442 U.S. 682 (1979) 9

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 30

Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156 (2012) 22

Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) 7, 28

Deposit Guaranty National Bank v. Roper, 445 U.S. 326 (1980) 21

Devlin v. Scardelletti, 536 U.S. 1 (2002) 10

Garner v. Teamsters Local Union Number 776, 346 U.S. 485 (1953) 17

Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013) 11

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 23

Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002) 31

International Longshoreman's Ass'n, AFL-CIO v. Davis, 476 U.S. 380 (1986) 18

Jacksonville Bulk Terminals, Inc. v. International Longshoreman Ass'n, 457 U.S. 702 (1982) 29

Lincoln Federal Labor Union Number 19129 v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949) 29

National Ass'n of Manufacturers v. NLRB, 717 F.3d 947 (D.C. Cir. 2013) 25

NLRB v. City Disposal Systems, Inc., 465 U.S. 822 (1984) 12, 13

NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775 (1990) 30

NLRB v. Town & Country Electric, Inc., 516 U.S. 85 (1995) 30

Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998) 19

Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) 19

Perrin v. United States, 444 U.S. 37 (1979) 19

Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987) 13

Salt River Valley Water Users Ass'n, 99 N.L.R.B. 849 (1952) 8

Salt River Valley Water Users Ass'n v. NLRB, 206 F.2d 325 (9th Cir. 1953) 9

Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co., 559 U.S. 393 (2010) 15, 17, 21

Spandsco Oil & Royalty Co., 42 N.L.R.B. 942 (1942) 8

United States v. Rodgers, 466 U.S. 475 (1984) 19

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) 12

STATUTES

29 U.S.C. §102 29

29 U.S.C. §103 29

29 U.S.C. §104 29

29 U.S.C. §151 ..... 3, 10, 14, 15, 16

29 U.S.C. §157 ..... 6, 26

29 U.S.C. §158(a)(1) 6

29 U.S.C. §159(a) 27

29 U.S.C. §160(b) 25

LEGISLATIVE MATERIALS

H.R. Rep. No. 80-245 (1947) 27

S. Rep. No. 80-105 (1947) 27

OTHER AUTHORITIES

Fed. R. Civ. P. 23(c)(3)(B) 10

Fed. R. Civ. P. 23(c)(2)(B)(iv) 10

John H. Beisner et al., *Class Action 'Cops': Public Servants or Private Entrepreneurs?*, 57 Stan. L. Rev. 1441 (2005) 31

Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617 (2010) 31

INTEREST OF *AMICUS CURIAE*[1]

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and contributes to legal proceedings affecting the retail industry. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. The RLC files amicus briefs on behalf of the retail industry in the cases of greatest importance to retailers.

The members of the RLC have a strong interest in the outcome of this proceeding. Relying on the legislative policy reflected in the Federal Arbitration Act ("FAA"), and this Court's consistent endorsement of the federal policy favoring arbitration, many of the RLC's members and affiliates enter into arbitration agreements with their employees. They do so because arbitration allows all parties to resolve disputes quickly

---

[1] Pursuant to this Court's Rule 37.3(a), counsel for all parties consented to the filing of this brief. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court.

Among other things, these agreements typically require that arbitration be conducted on an individual, rather than a class or collective, basis. As this Court explained in *AT&T Mobility LLC v. Concepcion*, collective resolution of claims on an aggregate or class-wide basis is "not arbitration as envisioned by the FAA" and "lacks its benefits"—the simplicity, informality, and expedition that are characteristics of arbitration. 563 U.S. 333, 351 (2011).

The National Labor Relations Board ("Board") has taken the position that individual arbitration agreements with employees are unfair labor practices under the National Labor Relations Act ("NLRA"). That position, if it were to prevail, would invalidate an important aspect of millions of arbitration agreements, to the detriment of both employers and employees. This petition presents the question whether the Board's position is correct. The members of the RLC therefore have a strong interest in this proceeding.

SUMMARY OF ARGUMENT

The employers in this case correctly argue that the Board's decision is irreconcilable with the Federal Arbitration Act. In this brief, the RLC demonstrates that the Board's decision cannot stand for an additional reason: its interpretation of the NLRA is unreasonable and is not entitled to deference.

The NLRA protects employees' rights to engage in "concerted activities," but class actions are not "concerted activities." Rather, one employee prosecutes a lawsuit, and, assuming the procedural requirements for class certification are satisfied, the rest of the employees await the outcome of the litigation. An employee who does nothing but wait for a settlement check is not engaging in "concerted activities." Class actions, which are procedural mechanisms for the efficient resolution of numerous claims, do not resemble the "concerted activities" the NLRA's drafters had in mind, which included unionization and otherforms of substantive, genuine employee collaboration.

Prohibiting enforcement of arbitration agreements in the name of the NLRA would also conflict with the NLRA's purposes. Section 1 of the NLRA explains that Congress intended to promote the goals of workers' "freedom of association, self-organization, and designation of representatives of their own choosing." 29 U.S.C. §151. Class actions do not advance these goals. If anything, they undermine them, by vesting power in an unelected class-action representative—or more realistically, an unelected class-action lawyer.

Further, if the Court upholds the Board's decision, an employee's right to bring a class action will depend on procedural rules adopted by courts—over which the Board has no control. Yet the reason the NLRA was enacted—and the reason the Board exists—is to establish a single set of federal rules governing labor relations.

The Board's interpretation of the NLRA is particularly implausible because class actions did not exist at the time of the NLRA's enactment. Accordingly, Congress could not possibly have intended the NLRA to protect the right to pursue a class action. And when Rule 23 was adopted, it was a *procedural* addition to the Federal Rules of Civil Procedure. The Board exceeded its authority by transforming Rule 23 into a *substantive* right under the NLRA.

Although the Board's decision would *reduce* the Board's authority in the aforementioned way by delegating authority vested in the Board to federal and state courts, the Board's decision would *increase* the Board's authority in a different way. Under the Board's decision, plaintiffs have a right under federal labor law to bring class actions under federal employment statutes like the Fair Labor Standards Act ("FLSA") and Title VII—even though those statutes do not themselves protect a right to pursue class actions, and even though the Board lacks authority to interpret and enforce those statutes. Neither of these adjustments in the Board's authority were contemplated by Congress.

Not only does the Board's decision unduly expand the scope of its power with respect to statutes adminstered by other agencies, but the decision trenches on the authority of federal courts. The Board's decision permits collateral attacks on federal court decisions enforcing arbitration agreements—in direct contravention of bedrock separation-of-powers principles. And permitting such collateral attacks creates yet another constitutional problem: by

punishing employers who file successful motions to dismiss class action lawsuits, the Board's decision violates the Petition Clause.

In addition to conferring a right on workers that the NLRA does *not* guarantee, the Board's decision strips workers of rights that the NLRA *does* guarantee. In particular, the Board's bar on individualized arbitration agreements strips employees of their statutory right to enter into binding agreements in which they agree to refrain from concerted activities and to resolve disputes with their employers individually. The Board cannot justify stripping workers of their statutory rights by relying on the Norris La-Guardia Act, as that statute is irrelevant to the question presented here.

Finally, the Board's decision is not entitled to *Chevron* deference. The Board has no particular expertise in class action practice. Nor did the Board purport to apply its expertise—rather, it imported Rule 23 and other pre-existing class action rules into the NLRA. *Chevron* deference is unwarranted when, as here, the Board interferes with the enforcement of statutes over which it has no direct control.

ARGUMENT

The RLC agrees with the employers[2] that the Board's interpretation of Section 7 of the NLRA conflicts with the Federal Arbitration Act. In this brief, the RLC advances an alternative, equally compelling, argument: even if the Federal Arbitration

---

[2] The "employers" refer to Petitioners in Nos. 16-285 and 16-300 and Respondent in No. 16-307.

Act had never been enacted, the Board's interpretation of the NLRA is incorrect. Class actions do not constitute "concerted activities" within the meaning of the NLRA. The Board's interpretation of the NLRA is so plainly contrary to the NLRA's text, history, and purpose that it could not be sustained under any standard of deference. But should the Court decide the applicable standard of deference, it should hold that the Board's decision should be reviewed *de novo*, because the justifications for *Chevron* deference are absent.

I. The Board's Interpretation of Section 7 of the NLRA is Incorrect.

Section 8(a)(1) of the NLRA, 29 U.S.C. §158(a)(1), states: "It shall be an unfair labor practice for an employer ... to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the NLRA. Section 7, 29 U.S.C. §157, states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The Board concluded that class action lawsuits constitute "concerted activities for the purpose of ... other mutual aid or protection" within the meaning of Section 7. Pet. App. 31a-35a.[3] That conclusion contradicts the text of the NLRA, has no basis in its history, and would cause results directly contrary to the purpose of the NLRA.

---

[3] "Pet. App." refers to the appendix to the Board's petition for a writ of certiorari in No. 16-307.

A. The Unilateral Filing of a Class Action Does Not Constitute "Concerted Activities."

Section 7 of the NLRA enumerates those employee "concerted activities" that are covered by the NLRA. "Concerted activities" means the activities of employees working in concert—that is, working *together*. If one employee is engaging in "activities," while representing a second employee who is sitting by passively, the two employees are not working in *concert*—even if the one employee's activities might benefit the other.

This straightforward textual interpretation finds support in the "maxim *ejusdem generis*, the statutory canon that where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) (brackets and quotation marks omitted). When employees "form, join, or assist labor organizations," 29 U.S.C. §157, they work together to form a united front against management. Similarly, when employees "bargain collectively through representatives of their own choosing," *id.*, the employees work together to choose representatives—for instance, by taking a vote—and the representative is vested with bargaining authority on behalf of the whole group through that group's collective action. By the same token, the phrase "other concerted activities" should be construed to refer to the activities of multiple employees working together.

In keeping with that interpretation, the Board has consistently ruled that employees who are *working together* to bring a lawsuit are engaging in protected activity. For instance, in *Altex Ready Mixed Concrete*, 223 N.L.R.B. 696, 700 (1976), the Board held that when a union filed a "lawful court action," and multiple employees executed "form affidavits" in support of that court action, the employees were engaging in protected "concerted activit[ies]." The Fifth Circuit upheld the Board's decision, holding that the affidavits "were filed in support of the union's petition for injunction in state court" and that "filing by employees of a labor related civil action is protected activity under section 7 of the NLRA." *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 296-97 (5th Cir. 1976). Thus, a lawsuit filed by a union—which, in turn, is the product of employees working in concert—was protected activity.

Even absent union involvement, the Board has found the prosecution of a lawsuit to be concerted activity—but only when multiple employees worked together. For instance, in *Spandsco Oil & Royalty Co.*, 42 N.L.R.B. 942, 949 (1942), the Board held that "the joining of ... three union members in [a] suit constituted concerted activity protected by the Act." Similarly, in *Salt River Valley Water Users. Ass'n*, 99 N.L.R.B. 849, 853-54 (1952), the Board held that the discussion and circulation of a petition designating an employee as an agent in an FLSA suit was "concerted activity." In upholding the Board's ruling, the Ninth Circuit emphasized that "[c]oncerted activity may take place where one person is seeking to induce action from a group," and that "[b]y soliciting signatures to the

petition," the employee "was seeking to obtain such solidarity among the [other employees] as would enable the exertion of group pressure." *Salt River Valley Water Users Ass'n v. NLRB*, 206 F.2d 325, 328 (9th Cir. 1953). Critical to these holdings was that all of the employees who stood to benefit from the litigation were collaborating together, and it was the act of *collaboration* that constituted the "concerted activities" protected by the NLRA.

Class actions, however, do not involve employees working together. The very definition of a class action is a case in which all employees *cannot* work together. Under Federal Rule of Civil Procedure 23(a)(1), a class can be certified only if "the class is so numerous that joinder of all members is impracticable"—that is, it is impracticable for all of the employees to collaborate together in the suit. Thus, a class representative prosecutes the suit, while representing the interests of other employees, who are not required to be named plaintiffs—or even to participate in the litigation—in order to recover damages. *See Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979) (noting that class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only"); Pet. App. 148a (Member Johnson, dissenting) (explaining that "an opt-out class action may be initiated and litigated by an individual employee from start to finish without *any action* whatsoever by other employees" (emphasis in original)). Those class members need not engage in any activities at all; they cannot be said to be engaging in "concerted activities" with the class representative.

There are certain activities that a class member can undertake—but they are not "*concerted* activities" with the class representative. A putative class member may opt out of the class action. Fed. R. Civ. P. 23(c)(3)(B). Alternatively, a class member may stay in the class, but object to the settlement. Fed. R. Civ. P. 23(c)(2)(B)(iv); *Devlin v. Scardelletti*, 536 U.S. 1, 9 (2002). Under those circumstances, the class member is working to undermine the class action, either by reducing the class's economic power or by countering the litigation decisions of the class representative. Those activities are the antithesis of "concerted activities" because they pit employee against employee. Yet the NLRA's purpose is to promote employee collaboration, not employee infighting. As explained below, *infra* at 15, Congress expressly characterized the NLRA's goal as "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." 29 U.S.C. §151. That goal is antithetical to a class action, where employees other than the class representatives have no say in whether a class is certified—and once the class is certified, their sole options are either to do nothing, or to undermine the class action that is supposedly representing their interests.

Similarly, "collective actions" under the Fair Labor Standards Act do not involve "concerted activities." Unlike class actions, collective actions require opting in, rather than opting out. When a Fair Labor Standards Act collective action is conditionally certified, the "consequence ... is the sending of court-approved written notice to employees, who in turn become

parties to a collective action only by filing written consent with the court." *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1530 (2013) (internal citations omitted). But that act of opting in is insufficient to satisfy the "concerted activities" requirement. Once the employee files a letter with the court, the named plaintiff is entitled to represent that employee's interests. Even though she may ultimately benefit from the suit, there is no requirement that she engage in concerted activities with the named class representative or any other employee.

Of course, in real-world class and collective actions, employees other than the named plaintiffs may participate in the litigation. They may be subpoenaed, participate in discovery, or testify at trial. Importantly, however, the Board's decision that class and collective actions constitute concerted activity did *not* depend on the fact that some (but not all) nonparty employees would actively participate in the litigation. Rather, the Board concluded that if a named plaintiff represents other employees, that representation *in and of itself* constitutes protected, concerted activity, because in the Board's view, the named plaintiff necessarily acts in concert with the employees that she represents. Or put another way: In the Board's view, even if the employee class member does not do anything and instead sits by passively, the mere act of being represented by the named plaintiff satisfies the "concerted activities" requirement. That ruling is incorrect. The mere act of *representing* someone does

not amount to engaging in *concerted activities* with that person.[4]

In reaching its contrary conclusion, the Board relied (Pet. App. 55a) on this Court's decision in *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984). That case, however, addressed a very different scenario. In *City Disposal Systems*, the Court held that an employee's invocation of a right in a collective bargaining agreement constituted concerted activity. The Court reasoned: "Obviously, an employee could not invoke a right grounded in a collective bargaining agreement were it not for the prior negotiating activities of his fellow employees. Nor would it make sense for a union to negotiate a collective bargaining agreement if individual employees could not invoke the rights thereby created against their employer. ... It was just as though [the employee] was reassembling his fellow union members to reenact their decision not to drive unsafe trucks." *Id.* at 832.

---

[4] For similar reasons, naming multiple class representatives does not transform the entire class action into concerted activity protected by the NLRA. Many class and collective actions have multiple named plaintiffs. In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), for instance, the 1.5 million class members were represented by three named plaintiffs. But that does not mean that the class action *as a whole* constituted concerted activity. Had the three named plaintiffs in *Wal-Mart* brought an action as co-plaintiffs, but not tried to certify a class, they might have been engaging in concerted activities *with each other*. But they were not engaging in concerted activities *with the class members* merely by virtue of having sought to represent them.

That reasoning does not apply here. The class representative does not rely on a collective bargaining agreement; rather, she relies on Federal Rule of Civil Procedure 23 or another applicable class or collective action procedural mechanism. Those rules, however, were not collectively bargained. Bringing a class action suit therefore does not "reassembl[e]" any collective decision. *Id.*

The more pertinent precedent is *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). Prill was a truck driver who was concerned about the safety of his employer's trucks. *Id.* at 1482. He contacted the Tennessee Public Service Commission, and was subsequently fired. *Id.* The Board held that firing Prill did not violate the NLRA, and the D.C. Circuit upheld the Board's decision. It deferred to the Board's view that "if a worker takes action by himself without contacting his fellow employees, even though he has a desire to help all workers, not just himself, he will not have satisfied the concerted action requirement." *Id.* at 1483. Rather, "concerted activities" refer to "those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Id.* at 1484 (quotation marks omitted). The Circuit Court distinguished *City Disposal Systems* on the ground that "a worker's actions are concerted when tied to the actions of his fellow employees, and in *City Disposal* [*Systems*], the collective bargaining agreement itself provided the bond between one worker and another." *Id.*

The Board did not purport to overrule the doctrine affirmed in *Prill*—indeed, the Board cited that case with approval. Pet. App. 42a-43a & n.42. And *Prill*'s reasoning applies to this case. An employee who unilaterally files a class action lawsuit may be acting for the benefit of his fellow employees, and his fellow employees' inclusion in the class may result in economic pressure on the employer. But given that the other employees are not *acting*, there are no concerted *activities* within the meaning of the NLRA.

The Board's position is especially odd because class actions are not permissible at the Board itself. The Board does not follow the Federal Rules of Civil Procedure, but instead follows its own Rules & Regulations, which contain no provision for employees to file a charge as a class. The Board thus apparently believes that the right to file a class action is a substantive right conferred by the NLRA—while the Board simultaneously denies employees that "substantive right" in the Board's own proceedings.

B. The Board's Interpretation of Section 7 Undermines the NLRA's Purposes.

In addition to violating the statutory text, the Board's decision conflicts with the NLRA's purposes, both as explained in the NLRA's preamble and as further elaborated by this Court.

i. The Board's Decision Undermines the NLRA's Purposes, as Explained in the NLRA's Preamble.

Section 1 of the NLRA, 29 U.S.C. §151, sets forth Congress's "Findings and declaration of policy" in

enacting the NLRA. It emphasizes the harms resulting from the "inequality of bargaining power" between employees and employers, and sets forth the goal of "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. §151.

The Board's decision does not advance these goals. First, a court does not certify a class based on whether certification would advance the purpose of remedying any "inequality of bargaining power." It certifies a class based on whether the procedural requirements for class certification, such as numerosity, commonality, and typicality, are satisfied.

Second, when the class is certified, it doubtless has greater "bargaining power," due to the risk of ruinous liability for the employer if the class prevails. But that is not the goal of class actions: the goal of class actions is to create a procedural device that efficiently aggregates claims that may be resolved through representative evidence. As explained in further detail below, *infra* at 21-22, Rule 23 is lawful *precisely because* it regulates procedure, not substance; the fact that "some (even many) plaintiffs will be induced to sue by the availability of a class action" is a mere "incidental effect" of the rule. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion) (quotation marks and brackets omitted). Creating a right to bring class actions as a means of effectuating "bargaining power" reflects a

cynical view of the class action that is inconsistent with the bedrock principle that Rule 23 is a procedural rule.

Third, class actions do not advance "freedom of association, self-organization, and designation of representatives of their own choosing." 29 U.S.C. §151. A class member is not exercising her right to "freedom of association," merely because she is being represented by a named plaintiff. Nor is a unilateral action by a named plaintiff the result of "self-organization." And employees are not engaging in the "designation of representatives of their own choosing" when a plaintiff files a class action. To be sure, employees in collective actions must opt in, and employees in class actions have the option of opting out. But the mere decision to opt into a collective action—or to acquiesce to being a class member rather than opting out of a class action—reflects neither "freedom of association" nor "designation of representatives" of the employees' "own choosing," when the employees played no role in the selection of the named plaintiff—or the named plaintiff's lawyer—in the first place.

The class action procedure is antithetical to the collective employee activity that Congress had in mind when it enacted the NLRA.

ii. The Board's Interpretation of Section 7 Undermines the NLRA's Purpose as Elaborated by This Court.

The Board's interpretation of Section 7 of the NLRA undermines the NLRA's overall purposes in an

additional respect: It contradicts the NLRA's purpose of ensuring a single national rule for labor relations.

The Board held that an employee's right to pursue a class action is limited to the procedures that are "otherwise available ... under statute or rule." Pet. App. 60a. Applying this rule means that, in states where class action rules are narrow, employees' Section 7 rights to pursue class actions are correspondingly narrow; in states where class action rules are broader, employees have a Section 7 right to take advantage of those broader procedures. If Rule 23 is broadened or narrowed, an employee's Section 7 right to pursue a class action is broadened or narrowed right along with it. Moreover, in some cases, the right to pursue a class action is broader in federal court than in state court, even for the same cause of action. *See, e.g., Shady Grove*, 559 U.S. at 398-99 (plurality opinion) (holding that plaintiff could pursue class action alleging violation of New York statute in federal court, even though New York law barred such actions in state court). In such cases, the Board's decision would mean that Section 7 protects the right to file the class action in federal court, but not in state court.

Congress clearly did not intend this result. The NLRA reflects a view that "centralized administration of specially designed procedures [were] necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." *Garner v. Teamsters Local Union No. 776*, 346 U.S. 485, 490 (1953). As such, the Board's interpretation of the NLRA—until now—has

always been centralized. In assessing the scope of the right to unionize or collectively bargain, the Board would never import the procedural rules enacted by a state court—and thereby allow the scope of the NLRA's protections to vary from jurisdiction to jurisdiction.

To the contrary, this Court has held that "when the activities sought to be regulated by a State are clearly or may fairly be assumed to be within the purview of [the NLRA]," "state jurisdiction must yield." *Int'l Longshoreman's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 389 (1986) (quotation marks omitted). Indeed, even when it is not "clear whether the particular activity regulated by the States was governed by [the NLRA]," courts "are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board." *Id.* at 389-90 (quotation marks omitted).

Importing Rule 23 into the NLRA, however, transforms courts into the "primary tribunals" to decide workers' substantive rights under the NLRA. Under the Board's view, workers in some states have a broad right to engage in "concerted activity," while workers in other states have a narrower right to engage in "concerted activity"—all based on the local procedural rules governing class actions in those states, over which the Board has no expertise or authority.

C. Section 7 Cannot Reasonably Be Interpreted to Confer a Right to Invoke a Procedural Rule that Did Not Exist at the Time of Section 7's Enactment.

The history of class action lawsuits confirms that they are not "concerted activities" under the NLRA.

The NLRA was enacted in 1935. Modern class action practice did not begin until Rule 23 was enacted in 1966. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833 (1999). The drafters of the NLRA could not have imagined modern class action practice. It is therefore improper to interpret the phrase "concerted activities" to encompass the right to file a class action. *Perrin v. United States*, 444 U.S. 37, 42 (1979) ("[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning ... at the time Congress enacted the statute" (citation omitted)).

Of course, the NLRA is not limited to the "specific set of circumstances that may have precipitated its passage." *United States v. Rodgers*, 466 U.S. 475, 480 (1984). To the contrary, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

Yet class actions are not even "reasonably comparable," *id.*, to the concerted activities that Congress could have contemplated when the NLRA

was enacted. They are fundamentally different from the types of collective litigation that then existed. The Board observed that "[g]roup litigation ... has long been part of Anglo-American legal tradition," Pet. App. 61a-62a, but such group litigation has involved multiple employees working *together* (for instance, in a jointly-filed lawsuit). The Board cited no authority that unilateral lawsuits on behalf of a class, of the sort Rule 23 now authorizes, existed in 1935, or that it is remotely plausible that Congress might have intended to include such lawsuits within the meaning of "protected activity."

The Board attempted to justify its approach on the ground that there were some "ways in which employees would be able to engage in protected efforts to improve their working conditions" that did not yet exist in 1935. Pet. App. 61a. The Board gave the example of the use of "social media," such as "Facebook," to "pursue unionization." But there is a difference between Facebook and a class action. If two employees discuss unionization on Facebook, it is the *discussion*—not the use of Facebook—that is protected. Such a discussion is directly analogous to a face-to-face discussion of unionization that would have indisputably constituted protected activity in 1935. By contrast, modern class actions have no 1935 analog.

D. The Board's Decision Violates the Rules Enabling Act.

The Rules Enabling Act provides that the Federal Rules of Civil Procedure—such as Rule 23—cannot expand a litigant's substantive rights. Yet the Board's decision, in effect, holds that Rule 23 *does* expand a

litigant's substantive right—in direct contravention of the Rules Enabling Act.

The Board characterized the right to pursue a class action as a *substantive* right under the NLRA. Pet. App. 41a-42a. This characterization was the critical premise behind the Board's holding: "Because mandatory arbitration agreements ... purport to extinguish a substantive right to engage in concerted activity under the NLRA, they are invalid." Pet. App. 43a.

But the supposed substantive right to pursue a class action has a unique feature that distinguishes it from other rights protected by the NLRA, such as the right to collectively bargain. The Board's decision holds that an employee's substantive rights extend to whatever class action procedures are "otherwise available to [the employee] under statute or rule." Pet. App. 60a. This means that in the early years following the NLRA's enactment, before the enactment of Rule 23, the substantive right to pursue a class action under the NLRA *did not exist*; if the Board is correct, this substantive right sprang into existence upon Rule 23's enactment decades after the NLRA was enacted.

When Rule 23 was ultimately enacted, however, it was enacted as a new *procedural* rule. This Court has been emphatic that Rule 23 is not a substantive right: "the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980). Indeed, Rule 23 could not have been adopted under the Rules Enabling Act *unless* it was a procedural rule. *See Shady Grove*, 559 U.S. at 407-08

(plurality opinion) (upholding Rule 23 under Rules Enabling Act because it does not "abridge, enlarge, or modify any substantive rights," but instead "enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits" and "leaves the parties' legal rights and duties intact and the rules of decision unchanged" (quotation marks omitted)).

Thus, the Board's decision violates not only the FAA, as the employers contend, but also the Rules Enabling Act. Under the Board's interpretation of the NLRA, Rule 23's enactment ushered in a new substantive right to pursue a class action that could override the FAA—which is precisely what the Rules Enabling Act holds that Rule 23 cannot do. The Board erred in transforming a *procedural* mechanism for aggregating claims into a *substantive* right that overrides other provisions of federal law.

E. The Board's Decision Impermissibly Expands the Board's Power.

The Board's decision impermissibly extends its jurisdiction over statutes that it has no right to administer. The Board has no authority to interpret or enforce the statutes commonly litigated in employment cases. For instance, it has no authority over federal employment discrimination statutes, which did not even exist until decades after the NLRA was enacted; rather, that authority lies with the Equal Employment Opportunity Commission. Likewise, it is the Department of Labor, not the Board, that has authority over the Fair Labor Standards Act. *See, e.g.*, *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2162 (2012). Yet the Board's interpretation of the

NLRA confers upon employees the substantive right to pursue class actions under those statutes—thus radically affecting the manner in which they are enforced.

The Board's decision not only arrogates power reserved to other agencies, but also arrogates power reserved to Congress. This Court has repeatedly held that claims arising under employment discrimination statutes can be arbitrated. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (holding that Congress did not preclude arbitration of claims arising under the Age Discrimination in Employment Act). It has rejected the view that private-plaintiff class actions are necessary to the enforcement of those statutes, noting that the EEOC retains the power to seek class-wide relief. *Id.* at 32 (rejecting the argument that "arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for ... class actions" and pointing out that "arbitration agreements will not preclude the *EEOC* from bringing actions seeking class-wide ... relief"). Yet the Board's decision overrules Congress's decision not to confer a right to class actions in the ADEA, by indirectly conferring a right to employment class actions through the NLRA.

The Board's decision also steps on the toes of the federal courts. In the *Murphy Oil* case, the Board vindicated what was, in effect, a collateral attack on a judicial decision. The employee filed her NLRB charge after the federal district court dismissed her class action lawsuit. She argued that Murphy Oil's enforcement of the arbitration clause through a

successful motion to dismiss constituted an unfair labor practice. Pet. App. 27a. The Board vindicated this collateral attack on the district court's decision by finding that Murphy Oil's motion—which the district court *granted*—violated the NLRA. Even more remarkably, the Board ordered Murphy Oil to pay the employee's attorney's fees incurred in connection with Murphy Oil's successful motion. Pet. App. 85a (ordering Murphy Oil to reimburse the employee for "all reasonable expenses and legal fees, with interest, incurred in opposing the Respondent's unlawful motion to dismiss their collective FLSA action and compel individual arbitration"). The Board's decision to, in effect, override the judgment of a federal court raises serious separation of powers concerns.

It also raises concerns under the Petition Clause. "[T]he Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011). In *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002), this Court was confronted with a decision by the Board holding that objectively reasonable lawsuits by an employer could violate the NLRA, so long as they were filed with a retaliatory purpose. *Id.* at 536. The Court noted that the Board's interpretation of the NLRA presented a "difficult constitutional question" as to whether it impermissibly deterred employers from exercising their Petition Clause right to file lawsuits. *Id.* at 534. It therefore avoided that difficult question by adopting a narrow interpretation of the NLRA: "reasonably based but unsuccessful suits" cannot

violate the NLRA, even if filed "with a retaliatory purpose." *Id.* at 536. In this case, Murphy Oil's motion was not only "reasonably based," but *successful*, yet Murphy Oil was still punished for it. The serious constitutional questions raised by that result is grounds enough for rejecting the Board's interpretation.

In the *Epic Systems* and *Ernst & Young* cases, the Board did not punish the employer for pursuing the motion to dismiss; rather, the federal court held that the employer's motion to dismiss should be denied, deferring to the Board's position that individualized employee arbitration agreements are unlawful. Thus, those courts applied the rule of law that the mere filing of an otherwise-meritorious motion is a substantive violation of an employee's rights. That result presents a Petition Clause concern: the employer's otherwise-meritorious motion was denied because of the Board's position that a successful motion to dismiss would violate the NLRA.

And it presents an additional separation-of-powers concern. The Board ordinarily cannot act without a party filing a charge: under Section 10(b) of the NLRA, the Board may declare that an unfair labor practice has occurred "[w]henever it is charged that any person" has violated the NLRA. 29 U.S.C. §160(b); *see also Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 951 (D.C. Cir. 2013) (Board cannot act *sua sponte*). Yet by declaring class action waivers unlawful, the Board announced a new rule which would be applied *without* a charge being filed. The *Epic Systems* and *Ernst & Young* lawsuits illustrate the effect of the Board's new rule: in those cases, the courts of appeals rejected the

defendants' efforts to enforce arbitration agreements because enforcing them would purportedly violate the NLRA, even though the Board was not a party to those cases. If this Court affirms the Seventh Circuit and Ninth Circuit, that same result will recur nationwide, contrary to the limitations on the Board imposed by Congress.

II. The Board's Decision Conflicts with Other Aspects of Federal Labor Law.

The Board's decision not only recognized a right to a class action that does not exist under the NLRA, but it strips workers of other rights expressly conferred by the NLRA. Further, contrary to the Board's suggestion, the Norris-La Guardia Act does not require arbitration agreements to be invalidated.

A. The Board's Decision is Inconsistent with Employees' Statutory Right to Resolve Disputes Individually.

Section 7 of the NLRA not only protects an employee's right to engage in concerted activities; it also protects each employee's right to "refrain from any or all of such activities." 29 U.S.C. §157. Yet as a dissenting Board member explained, Pet. App. 94a n.13, 116a, 124a-125a, the Board's decision is a ban on an employee's voluntary decision to enter into an individualized arbitration agreement with an employer, thereby nullifying the employee's right to refrain from class actions. Of course, even under the Board's decision, an employee could voluntarily agree to arbitrate a claim, and forego a class action, even after a dispute arises. But it is frequently in an employee's

interest to sign a bilateral arbitration agreement in advance, to guarantee that the employee benefits from arbitration's speed and efficiency. Ironically, the Board's decision would strip employees of their right to enter into a binding commitment not to engage in the supposedly concerted activity of class action litigation.

Similarly, Section 9(a) states that "any individual employee ... shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative." 29 U.S.C. §159(a). The legislative history confirms that this provision was intended to protect an employee's right to litigate and settle disputes on an individualized basis. H.R. Rep. No. 80-245, at 34 (1947) (rejecting Board's prior position that union representative "has the right to take over the grievances," and noting that Section 9(a) "permits the employees and their employer to settle the grievances"); S. Rep. No. 80-105, at 24 (1947) (the "employee's right to present grievances exists independently of the rights of the bargaining representative"). Yet the Board's position strips the employee of this right to enter into a binding agreement under which the employee would individually resolve a dispute with an employer. The employee cannot sign away this right to file a class action, even if she wants to.

And she may well want to. This Court has repeatedly emphasized that employees, like employers, have legitimate reasons for arbitrating claims. Arbitration is an inexpensive and speedy way of resolving disputes. *AT&T Mobility LLC v.*

Concepcion, 563 U.S. 333, 345 (2011) ("[T]he informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution."). Speed and informality are particularly beneficial in employment cases. *Circuit City*, 532 U.S. at 123 ("Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts."). And agreeing to an arbitration agreement may be necessary for an employee to obtain a higher salary—or to be hired in the first place, given that in some cases, the likely costs of even a remotely potential class action might make the hiring of additional employees unprofitable. Yet the Board has transformed the NLRA into a straightjacket, under which employees are banned from signing an individualized arbitration agreement. That policy is inconsistent with the NLRA's bedrock principle of employee autonomy.

B. The Board's Decision is Inconsistent with the Norris-La Guardia Act.

The Board also "look[ed] to" the Norris-La Guardia Act for support, while acknowledging that its interpretation of that Act was not entitled to deference. Pet. App. 48a. Citing a law review article for support, the Board concluded that the Norris-La Guardia Act invalidated arbitration agreements with class waivers. Pet. App. 48a-50a. The Board's position was incorrect.

The Norris-La Guardia Act states, in relevant part, that employees shall be "[f]ree from the interference, restraint, or coercion of employers of labor, or their

agents, in ... self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," and bars "any undertaking or promise ... in conflict with" this public policy. 29 U.S.C. §§102, 103. The purpose of this provision was to prevent so-called "yellow dog contracts," *i.e.*, "agreements stating that the workers were not and would not become labor union members." *Lincoln Fed. Labor Union No. 19129 v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 534 (1949).

The comparison to an arbitration agreement is absurd. An arbitration agreement does not inhibit unionization. Unionized employees who sign arbitration agreements are not inhibited, in any way, from collectively bargaining through their unions.

The Norris-La Guardia Act also divests courts of power to enjoin any person from participating in a strike. It prohibits courts from issuing an injunction "in any case involving or growing out of any labor dispute" that would prohibit persons from engaging in numerous types of protected activities. 29 U.S.C. §104. These protected activities include participating in a strike; being a member of a labor organization; or offering assistance to striking employees. *Id.* The purpose of this provision was "to remedy the growing tendency of federal courts to enjoin strikes." *Jacksonville Bulk Terminals, Inc. v. Int'l Longshoreman Ass'n*, 457 U.S. 702, 708 (1982).

Enforcing arbitration agreements has nothing to do with enjoining strikes. The Norris-La Guardia Act was intended to protect picketers, not class plaintiffs, let

alone passive class members. The Board's reliance on that statute is revisionist history.

III. *Chevron* Deference is Unwarranted.

Although this Court ordinarily defers to the Board's interpretation of the NLRA under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), no such deference is warranted here for several reasons.

The Court has held that the Board is entitled to *Chevron* deference based on its "primary responsibility for developing and applying national labor policy." *NLRB v. Curtin Matheson Sci., Inc.*, 494 U.S. 775, 786 (1990). It has emphasized that Congress "likely intended an understanding of labor relations to guide the Act's application." *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 90 (1995).

Yet here, the Board is not "developing and applying national labor policy" on class actions. It is not defining a set of procedures that are necessary to vindicate employees' NLRA rights. Rather, it is saying that an employee's right to pursue class actions is whatever a court says it is. This rule is not "national" because it will vary from jurisdiction to jurisdiction. It is also not a "labor policy" in any meaningful sense because it simply imports the rules developed by other regulators without reflecting the exercise of independent judgment.

Nor is the Board applying its "understanding of labor relations." The Board has no expertise on class actions. Class actions are not even permissible before the Board, so the Board has no first-hand knowledge of

how they work in practice. The statutes that are vindicated through class actions, such as the FLSA and employment discrimination statutes, also lie outside the Board's authority and expertise. There is no evidence that the Board was aware of the rich literature arguing that class actions typically are far more lucrative for class counsel than they are for the class. *See, e.g.*, Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 618-19 (2010); John H. Beisner et al., *Class Action 'Cops': Public Servants or Private Entrepreneurs?*, 57 Stan. L. Rev. 1441 (2005). The Board may have a policy preference for class actions, but it has no expertise on the benefits and harms of the class action device. The justifications for deferring to the Board's interpretation of the NLRA are therefore absent.

Finally, this Court has "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002). Here, the Board's position not only trenches upon the NLRA, but also trenches upon the substantive statutes that do not, by themselves, confer a right to pursue class actions. *Supra*, at 22-23. As such, the Court should not defer to the Board's decision.

CONCLUSION

The judgment of the Fifth Circuit should be affirmed, and the judgments of the Seventh and Ninth Circuits should be reversed.

Respectfully submitted,

DEBORAH R. WHITE
RETAIL LITIGATION
CENTER, INC.
1700 N. Moore Street
Suite 2250
Arlington, VA 22209

ADAM G. UNIKOWSKY
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com